the landlord, the giving of notice to quit and the acceptance of the premises.

As the defendant and the other purchasers cannot grant a tenancy to the defendant it follows that the defendant ceased to be a tenant when he and the other purchasers bought the property in November, 1950.

There is another reason why I must hold that the defendant is not a tenant. In my view there has been a surrender of the tenancy by operation of law.

Ang Thiam Teen said in evidence, and I accept it, that when they bought the said land it was their intention to cut the land into lots so that each lot could be conveyed to the individual purchasers. This fact coupled with the fact that the tenant-purchasers agreed that none of them should pay ground rent any further showed that the intention of the tenant-purchasers was to occupy their respective lots as co-owners.

For these reasons I have come to the clear opinion that the defendant is not a tenant of the premises.

It is pleaded that the defendant become a tenant of Century Estate Ltd. upon the transfer of the said land to the company in return for shares therein and that the tenancy arose out of the undated agreement made in 1961. I need only say that there is no substance in this.

There will be judgment for the plaintiffs with costs and there will be a declaration and injunction as prayed for.

Declaration and injunction granted.

Solicitors: *Lee & Lee; Hilborne & Co.*

RAWTHER v. ABDUL KAREEM

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) & Suffian J.) May 9, 1966]

[K.L. — Federal Court Civil Appeal No. 26 of 1965]

Malicious prosecution — Onus of proof — Whether defendant set criminal law in motion — Reasonable and probable cause for allegations made by defendants — Appeal succeeding on points not presented in court below — Costs.

This was an appeal by the defendant in an action in which the respondent (plaintiff) successfully sued for damages for malicious prosecution ([1965] 2 M.L.J. 132). The facts were that there was a dispute relating to a limited liability company carrying on business in Kuala Lumpur. The respondent claimed to be a shareholder in the company but the appellant alleged that he was not. Affidavits were filed in winding-up proceedings by the appellant and the respondent. As a result, it appears, of an anonymous letter police investigations were conducted and the result was that the respondent was charged for making a false affidavit. He was acquitted at the trial and he subsequently brought the action for malicious prosecution against the appellant. The appellant did not appear at the trial and judgment was given against him.

Held: (1) in all the circumstances of the case and on the evidence as it stood, it was clearly impossible to hold that the appellant was responsible for the prosecution unless it was proved that whatever statements he made to the police were made without a belief in their truth for which he had reasonable and probable cause; and there was no evidence in this case to make out an absence of reasonable and probable cause on the part of the appellant that would call for rebuttal from him;

(2) in the circumstances as two of the necessary ingredients necessary to be proved for a successful action for malicious prosecution had not in fact been proved, the appeal must be allowed.

Cases referred to:—

(1) *Glinski* v. *McIver* [1962] A.C. 726, 741.

(2) *Bradshaw* v. *Waterlow & Sons Ltd.* [1915] 3 K.B. 527, 535.

(3) *Abrath* v. *North Eastern Rly. Co.* 11 Q.B.D. 440, 448; 11 App.Cas. 247.

(4) *Sutton* v. *Johnstone* (1785), 1 Term Rep. 493.

(5) *Hicks* v. *Faulkner* 8 Q.B.D. 167, 171.

(6) *Herniman* v. *Smith* [1938] A.C. 305, 316.

(7) *Croydon Corporation* v. *Croydon Rural District Council* [1908] 2 Ch. 321.

FEDERAL COURT.

M. Edgar for the appellant/defendant.

K. A. Menon for the respondent/plaintiff.

Cur. Adv. Vult.

Thomson L.P.: This is an appeal by the defendant in an action in which the plaintiff successfully sued for damages for malicious prosecution.

The facts of the case are by no means clear but would appear to be as follows.

The defendant and his brother were shareholders (the defendant has always said the only shareholders) in K. Ismail Ghaney Rawther & Co. Ltd., a limited liability company carrying on business in Kuala Lumpur. Differences arose between the brothers and in 1959 the defendant commenced proceedings which were opposed by his brother for the compulsory winding-up of the company. Then in January or February, 1960, the present plaintiff took steps to be joined as a party on the ground that he was a shareholder in the company and he opposed the petition.

On this the defendant took up the attitude that the plaintiff was not a shareholder and that a share certificate on which he relied was not genuine and on 6th February, 1960, he swore an affidavit and filed it in the winding-up proceedings. That affidavit has not been produced in evidence in the present proceedings and whether it contained any allegation of actual forgery it is impossible to say. The nature of some of its contents can be gathered from a counter affidavit sworn by the plaintiff on 12th February, 1960. That affidavit referred to the defendant's affidavit and went on:—

"It is untrue as stated in the said affidavit that (a) S. M. Abdul Kareem is not a shareholder of the company,

(b) no consideration was paid for the 300 shares held by the said S. M. Abdul Kareem, (c) at the time of issue of share certificate for him and me, the said K. E. Packeer Mohiadeen Rawther signed any blank share certificate forms, (d) the share certificate issued to the said S. M. Abdul Kareem was not duly sealed with the authority of both the directors, (e) M. Mohideen Bacha was not the secretary of the company on the date the said certificate was sealed, that is 29th July, 1958."

About this time the winding-up proceedings came to the notice of Inspector Donald Aeria of the commercial crimes branch of the police and he commenced to make investigations which resulted in the arrest of the plaintiff on 11th April, 1960. He was released on police bail and the following day he appeared in the sessions court on a charge that his affidavit of 12th February, 1960, which has already been quoted, was false and in making it he had committed an offence under section 199 of the Penal Code.

The trial in the sessions court commenced on 3rd August, 1960, and occupied eight days spread over a period of some three months. The defendant himself gave evidence on the first day of the trial and on 7th November the president held that there was no case to answer and acquitted and discharged the accused. The president gave his reasons for taking that course in a short note, the material portions of which read as follows (*sic*) :—

"The evidence of the prosecution which greatly depended upon P.W.4 K. E. Packir Meideen (*the present defendant*) is quite unsatisfactory.

Other prosecution witnesses are at complete variance therewith, I did not accept P.W.4's testimony.

In that it has certainly not been established by the prosecution at this time that the accused was not what he purported to be i.e. the holder of 300 shares in Messrs. Ismail Ghany Rawther & Co. at the relevant date charged.

Indeed were it so established, which I hold it is not then most certainly in the circumstances disclosed in this case there is no evidence whatever that the accused intentionally made a false declaration for he although the subject of certain arbitration proceedings concerning his shares was on the evidence never a party thereto. To quote that evidence 'S. M. Abdul Kareem was not consulted nor was he present' would therefore the evidence adduced at this time if unrebutted warrant the conviction of the accused for the offence brought against him."

On 15th December, 1960, the plaintiff commenced the present proceedings.

The statement of claim averred that on 11th April, 1960, the plaintiff was arrested "at the instance of the defendant". He was later charged in the sessions court on the charge which has already been mentioned. It continued:—

"The defendant by his affidavit dated the 6th day of February 1960 set in motion the prosecution against the plaintiff and he further instructed his solicitors Messrs. Braddell & Ramani who acting for and on behalf of the defendant gave information to Police Inspector Donald Aeria that the plaintiff had committed an offence as stated in paragraph 2 hereof and had the plaintiff arrested and charged in Kuala Lumpur Sessions Court Arrest Case No. 121 of 1960."

The plaintiff was acquitted and discharged without his defence being called upon and the president of the sessions court "said *inter alia* that he held that the defendant's evidence in court was unreliable, untrue and or false in all material particulars". The defendant acted falsely, maliciously and without reasonable and probable cause and the plaintiff had been injured and had suffered damage.

The defendant filed a defence in which he denied that the plaintiff was arrested at his instance and averred that the prosecution of the plaintiff was not initiated by him or his solicitors but that the charge was brought and the prosecution carried on by the public prosecutor.

The trial of the action did not come on till almost four years after the issue of the writ and when it did come on the defendant did not appear and was not represented. No explanation of this has been given at any time and the case was dealt with under Order 36 rule 31 which reads as follows:—

"If, when a trial is called on, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him."

In the circumstances the case had to be decided on the basis of such admissions as there were in the pleadings and of the evidence called for the plaintiff and it is impossible to avoid thinking that this may have led to a perhaps natural but none the less unfortunate laxity in the presentation of the plaintiff's case, as a result of which there were considerable *lacunae* in the evidence. Moreover, a case of a difficult type had to be dealt without the assistance of counsel on both sides.

The trial judge dealt with the matter briefly and concisely. He took the view that the defendant had elected not to appear and so "had chosen not to dispute the claim". Nevertheless he accepted it that the plaintiff had to prove his case and he found that on the evidence the plaintiff was clearly entitled to succeed.

The defendant had deliberately made allegations of a criminal offence or offences of a serious nature against the plaintiff to Inspector Aeria whose duty it was to act on such information. "The prosecution was a direct result of these allegations." There undoubtedly was malice as there had been ill-will for some considerable time between the parties. And "I cannot, without any assistance from the defendant himself discover any reasonable or probable cause." The plaintiff had suffered pecuniary damage in having to defend himself and grave injury to his reputation. He was accordingly entitled to damages and special damages of $4,200 and $10,000 damages were awarded.

Against that decision the defendant has now appealed.

Before us the conclusions of the trial judge have been attacked on a number of grounds, with many of which it is unnecessary to deal. Others, however, merit consideration though it is impossible to refrain from observing that some of the arguments to which we have listened might with much profit been advanced at the trial.

Any action for malicious prosecution raises questions of difficulty. On the one hand there is the need to protect the reputation of the individual against unjustified attacks and his pocket against the expense of defending himself against unjustified criminal proceedings. On the other hand the courts have always recognised the necessity of affording protection to persons who, whatever their real motives, assist in the administration of public justice. As was said by Viscount Simonds in the case of *Glinski* v. *McIver* [1] :—

> "in such cases as these the liberty of the subject is involved on the one side, and on the other the risk that the citizen in the performance of his duty may be embarrassed if a jury too readily gives a verdict in favour of a plaintiff who has been prosecuted and acquitted."

In any such action the plaintiff must prove at least five things and unless he does so he cannot succeed. He must prove that the defendant set the criminal law in motion against him. He must prove that the criminal proceedings against him terminated in his favour, that the defendant had no "reasonable and probable cause" for setting the law in motion against him and that the plaintiff was actuated by malice in the sense that he had a motive other than only to carry the law into effect. And for historical reasons (the action was originally in case) he must prove damage.

In the present case the plaintiff was certainly prosecuted on a criminal charge, that prosecution terminated in his favour because he was acquitted and discharged, he clearly suffered damage and the trial judge found there was malice. But was it proved that it was the defendant who set the criminal law in motion against him? And was it proved that the defendant lacked reasonable and probable cause for whatever allegations he made against the plaintiff?

Now this was not a case of a private prosecution. It was a police prosecution and, moreover, a police prosecution which was and, by reason of section 129 of the Criminal Procedure Code, only could be undertaken by and with the sanction of the public prosecutor and it is therefore important to examine how it came into being, so to speak.

The matter came to the attention of Inspector Aeria on 26th March, 1960. At the trial of the present action he was not asked how or when it first came to his attention (points which might have been thought to be of some importance) but in November, 1960, at the trial in the sessions court, he said that he had had an anonymous letter. At some stage, but just when it is not clear, certain information, to which I shall come in a moment, was given to him by the defendant personally and on 29th March, 1960, he drew up and filed in the police file a first report which was a necessary step to enable him to exercise his statutory powers of investigation under the Criminal Procedure Code in addition to his ordinary powers under the Police Ordinance.

That first report set out the facts of the litigation between the brothers. It then continued:—

> "4. In the meantime one S. M. Abdul Kareem an employee of the firm (*the present plaintiff*) made an application to the court opposing the winding up of the firm and claiming that he was also a shareholder holding 300 shares the elder brother's lawyers examined the files of the Registrar of Companies and it was found that the documents relating to these shares were filed in January 1960 after winding up proceedings had commenced. The share certificate bears the date 29th July 1958. These documents were filed by the younger brother as a director of the company and he had also paid a penalty fee for the late filing of the said documents.
>
> 5. The elder brother K. E. Pakeer Mohideen Rawther (*the present defendant*) claims that the share certificate is a forgery and that it was made out without his approval. He further claims that his younger brother had inserted entries in the account books to support the claim of S. M. Abdul Kareem (*the present plaintiff*) in respect of the 300 shares worth $30,000 and had cut out his signature from other documents, typed over them the necessary words to indicate that he (Pakeer Mohideen) had authorised these entries.
>
> 6. The above information disclose offences under sections 468 and 477A of the Penal Code. I therefore lodge this report in order to institute enquiries into the above mentioned offences."

Unfortunately at the trial Inspector Aeria was not invited to relate the course of his investigations in any detail but it is clear that they were extensive. Prior to 29th March, when he drew up his first report, he clearly had had some sort of statement from the defendant. It is, however, to be observed that in his report there is no allegation of any offence having been committed by the present plaintiff; there is an allegation of forgery by an unspecified person and there are allegations of forgery and of falsification of accounts by the defendant's brother. But by 17th April, the day on which the plaintiff was arrested and the day before he first appeared in the sessions court, it had clearly been decided not to prosecute the defendant's brother but to prosecute the plaintiff and to prosecute him not for forgery but for swearing a false affidavit and this can only be accounted for by Inspector Aeria having obtained copies of a number of documents, including the affidavits of the plaintiff and the defendant, which were subsequently produced at

the sessions court trial and having obtained information from at least some of the twelve witnesses who gave evidence other than formal evidence at that trial. And as has been pointed out the prosecution was undertaken with the sanction of the public prosecutor which could only have been given after consideration of the material in the possession of the police.

In all the circumstances, on the evidence as it stands, it is clearly impossible to hold the defendant responsible for the prosecution unless it was proved that whatever statements he made to the police were made without a belief in their truth for which he had reasonable and probable cause.

Support for that view is to be found in the following observations by Pickford L.J. in the case of *Bradshaw* v. *Waterlow & Sons, Ltd.* [2] :—

> "In this case also the facts have been laid before the Attorney-General to obtain his fiat under the Prevention of Corruption Act, 1906, and it is difficult to see how under those circumstances there can be said to be an absence of reasonable and probable cause when the Attorney-General had granted his fiat and the facts were not shown to be unfairly put before him."

And before departing from this part of the case it is to be observed that at the trial there was no evidence to support the averments in the pleadings on which the plaintiff based his claim and which have never at any time been amended. Those averments were that it was by his affidavit dated 6th February, 1960, that the defendant "set in motion" the prosecution and that his solicitors on his instructions gave information to the police that the plaintiff had committed the offence for which he was prosecuted.

As regards the affidavit, however, there is no evidence whatsoever as to the stage of Inspector Aeria's investigation at which it came to his notice or as to how it came to his notice and in any event we do not know its full contents because for some reason the plaintiff did not produce it at the trial though he must have had in his possession the copy served on him in the course of the winding-up proceedings. And as regards the alleged activities of the plaintiff's solicitors the plaintiff at the trial made the bare assertion that "the defendant caused this prosecution to be instituted by solicitors, Messrs. Braddell and Ramani" but he gave no particulars as to how or when this was done and though Inspector Aeria gave evidence at a later stage nothing whatever was put to him on the point. And after all he was not only the plaintiff's witness but the person best qualified to speak to the point.

I now pass to the only other ground of appeal that calls for consideration and that is that the trial judge misdirected himself as to the burden of proof on the issue of "reasonable and probable cause" and that there was no evidence to support a finding of absence of reasonable and probable cause on the part of the defendant.

Now it is well-settled law that in an action of this nature the onus lies on the plaintiff to show that the prosecution of which he complains was instituted without reasonable and probable cause. The matter was thus stated by Brett M.R. in the case of *Abrath* v. *North Eastern Railway Co.* [3] :—

> "it is not enough for the plaintiff to show, in order to support the claim which he has made, that he was innocent of the charge upon which he was tried; he has to show that the prosecution was instituted against him by the defendants without any reasonable or probable cause and with a malicious intention in the mind of the defendants, that is, not with the mere intention of carrying the law into effect, but with an intention which was wrongful in point of fact. It has been decided over and over again that all these points must be established by the plaintiff, and that the burden of each of them lies upon the plaintiff."

In the same case in the House of Lords the Earl of Selborne said simply (at p. 249) :—

> "The burden of satisfying the jury that there was no reasonable and probable ground for the prosecution lies upon the plaintiff."

And Lord FitzGerald said this (at p. 255) :—

> "I do not entertain any doubt that the issue upon the question of probable cause as well as upon the question of malice lies upon the plaintiff, in this sense, that the plaintiff is bound to offer evidence sufficient, if uncontradicted, to sustain both these issues on his behalf."

Moreover absence of reasonable cause cannot be inferred from malice. As was said by Viscount Simonds in the case of *Glinski* v. *McIver, supra,* (at p. 743) :—

> "Since the case of *Sutton* v. *Johnstone,* [4] and no doubt earlier, it has been a rule rigidly observed in theory if not in practice that, though from want of probable cause malice may be and often is inferred, even from the most express malice, want of probable cause, of which honest belief is an ingredient, is not to be inferred. I think that the importance of observing this rule cannot be exaggerated, for it is just at this stage that a jury inflamed by its own finding of malice may proceed almost automatically to a finding of want of honest belief. It is, of course, possible that the same facts may justify both findings. But it behoves the judge to be doubly careful not to leave the question of honest belief to the jury unless there is affirmative evidence of the want of it."

As to what is "reasonable and probable cause" in this connection it is not necessary to go beyond the following definition by Hawkins J. in *Hicks* v. *Faulkner* [5] which was approved by the House of Lords in *Herniman* v. *Smith* [6] :—

> "I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

In the present case there can be little doubt that the failure of the defendant to appear at

the trial led to the point receiving less consideration than it should have received. Nevertheless that non-appearance could not be construed as any sort of admission so as to absolve the plaintiff from the requirement of Order 36 rule 31 to "prove his claim so far as the burden of proof lies upon him". And so far as concerns the issue of reasonable and probable cause it is possible that the learned trial judge misdirected himself. What he said was this:—

"There undoubtedly was malice, as there had been ill-will for some considerable time between the parties; and I cannot, without any assistance from the defendant himself, discover any reasonable or probable cause."

Now, if this means that the judge inferred absence of reasonable and probable cause from the existence of malice or if he considered that the onus of proving the existence of reasonable and probable cause lay on the defendant then, with great respect, it is wrong.

It may, of course, mean that the judge took the view that there was evidence to make out absence of reasonable and probable cause and so to cause the onus of proof to pass to the defendant. But he has not said so and on my own examination of the record of the trial I am unable to discover any such evidence.

The only evidence having any bearing on the point was that of the plaintiff himself and part of the record of the criminal trial in the sessions court.

All the plaintiff said was that the allegations in paragraph 5 of Inspector Aeria's report were untrue and that "the defendant knew I was really a shareholder in the company". He also said that he derived his share in the company through his father's interest in the partnership which had preceded the incorporation of the company and in support of this he produced a document dated 26th October, 1932, of which it is difficult to see the relevance.

Then there was part of the record of the sessions court trial and this part was so woefully incomplete that it is impossible to avoid thinking that it was never read at any time even by counsel who put it in evidence. All that was put in was the sessions court president's notes of the parol evidence and his findings. But in addition to the parol evidence there was a great volume of documentary evidence. There were at least 48 documents produced including the two affidavits in question in the case and the disputed share certificate. None of this was produced in the present proceedings and without it the president's notes of the parol evidence are virtually unintelligible.

And I do not think that the president's views take the matter any distance at all so far as the present proceedings are concerned. The prosecution evidence was quite unsatisfactory and he did not accept the defendant's evidence. It was not established that the plaintiff was not the holder of 300 shares in the company and there was no evidence whatsoever that he intentionally made a false affidavit. No doubt these views are entitled to respect. But in the absence of any intelligible account of the evidence on which they were based it is impossible to form any opinion as to their correctness. And indeed, in any event, it would be wrong to do so. What is binding on any other court is the finding to which they led which was that the plaintiff was not guilty of the offence with which he was charged, that is to say it had not been proved to the satisfaction of a court having jurisdiction that he had made his affidavit of the 12th February, 1960, knowing its contents to be false on a material point. But that did not amount to a finding that the defendant's affidavit of 6th February was untrue to the knowledge of the defendant or that he did not with reason believe to be true his evidence in the sessions court, which it is to be presumed was the same as the information he gave from time to time to the police.

It was for the trial judge to form his own views on the point and if he had had before him the whole of the evidence in the sessions court he might have been in a position to do so. But he did not have the full evidence before him and indeed it is not clear that he considered even such of the evidence as was before him. And for myself I am unable to discover anything sufficient even when read with the plaintiff's evidence in the present case that would suffice to make out an absence of reasonable and probable cause on the part of the defendant that would call for rebuttal by him.

In the circumstances I would allow the appeal.

There remains, however, the question of costs.

As regards costs the case is analogous to one where an appeal has succeeded on points not presented in the court below (see *Croydon Corporation* v. *Croydon Rural District Council* [7]). In the circumstances there should be no costs of the appeal. As regards the costs in the court below the defendant should have them but only down to the filing of defence.

Barakbah C.J. (Malaya) and **Suffian J.** concurred.

Appeal allowed.

Solicitors: *Morris Edgar & Co.; Richard Talalla & Menon.*